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INSPEKTOR M YUSOF JAHAYA & ORS v. CHIN HOCK WA & ORS

HIGH COURT MALAYA, SHAH ALAM
ALICE LOKE YEE CHING JC
[CIVIL APPEAL NO: BA-12B-159-11-2019]
B 11 JANUARY 2021

CRIMINAL PROCEDURE: *Seizure – Procedure by police on seizure of property – Application under s. 413 of Criminal Procedure Code for return of items to jewellers – Dispute on exhibits – Whether there was breach of duty of care owed for items* C *to be kept safe – Whether there was negligence in handling of jewellery items – Quantum of damages – Assessment of*

TORT: *Negligence – Seizure of property – Jewellery seized by police as exhibits in criminal proceedings – Whether items found to be used in commission of offence* D *required to be in safe custody of police for investigation and subsequent prosecution – Application under s. 413 of Criminal Procedure Code for return of items to jewellers – Dispute on exhibits – Whether there was breach of duty of care owed to jewellers for items to be kept safe – Whether there was negligence in handling of jewellery items – Quantum of damages – Assessment of*

E ***POLICE:*** *Powers – Seizure of property – Jewellery seized by police as exhibits in criminal proceedings – Whether items found to be used in commission of offence required to be in safe custody of police for investigation and subsequent prosecution – Application under s. 413 of Criminal Procedure Code for return of items to jewellers – Dispute on exhibits – Whether there was breach of duty of care owed to jewellers* F *for items to be kept safe – Whether there was negligence in handling of jewellery items – Quantum of damages – Assessment of*

CIVIL PROCEDURE: *Cause of action – Pleadings – Whether cause of action expressly pleaded in statement of claim – Whether necessary to plead elements constituting negligence – Rules of Court 2012, O. 18 r. 12(1), O. 18 r. 8(1)(a) –* G *Whether complied with*

The plaintiffs were siblings and partners of a jewellery shop. On 1 February 2001, at about 4.30pm, five men robbed the jewellery shop of the plaintiffs and the jewellery loss from the offence committed was valued at about RM50,000. The robbers were successfully apprehended and the jewellery H items were recovered from them. The suspects were charged in the Sessions Court on 4 February 2001 under ss. 395 and 397 of the Penal Code. On 5 February 2001, the first plaintiff together with a representative of their insurers went to the police station to identify the recovered jewellery items. The first plaintiff confirmed that the jewellery which comprised of bangles I as well as bracelets of various sizes were taken from the plaintiffs' shop, identified from the design and colour. A list of items recovered were prepared by the investigating officer, totalling 58 items in all, and all the

items had tags on them, save for three. The total weight in gold of the recovered items was 1,436.17g. The following day, the recovered items were also identified by three staff personnel of the plaintiffs from their handwriting on the tags. The criminal proceedings against the accused persons were eventually concluded in 2013. Prior to 2013, the plaintiffs made enquiries about the return of the jewellery. In response to the plaintiffs' query, they were informed by the police that as the jewellery were exhibits in the prosecution's case, it could only be returned when the criminal proceedings against all the accused persons have concluded. In April 2012, the plaintiffs filed an application under s. 413 of the Criminal Procedure Code for the return of the items taken from their shop, which was heard on 19 June 2012. On the day of the hearing, the exhibits were produced in the Sessions Court in the presence of the presiding Sessions Court Judge ('SCJ'), the investigating officer, the Deputy Public Prosecutor and all the plaintiffs. However, upon being asked to identify the items, the plaintiffs denied that the exhibits belonged to them as the jewellery were not of the type sold in their shop. The plaintiffs claimed that the exhibits produced in court were not pure gold but merely gold-plated jewellery and that there was a difference in the weight in gold of about 82.08g. The weight of the exhibits produced in court was 1,518.25g when it ought to have been 1,436.17g instead. Thereupon, the plaintiffs refused to take possession of the exhibits. The plaintiffs made a police report. The exhibits were then sent to the Chemist Department for analysis and the findings of the chemist confirmed the allegation of the plaintiffs that the exhibits were made of copper and plated with gold. The plaintiffs filed the instant suit in the Sessions Court. The plaintiffs' cause of action was premised on the defendants' negligence in the handling of the plaintiffs' jewellery items. The relief sought was for an order that the defendants deliver the items as identified by the plaintiffs on 5 February 2001 and alternatively, the defendants compensate the plaintiffs the sum of RM330,000 for the loss of the jewellery or at the current price of gold. The Sessions Court found that (i) the plaintiffs had established that the jewellery first recovered from the accused persons were theirs, but the exhibits brought to court on their s. 413 application were not; (ii) that the defendants had breached their duty of care owed to the plaintiffs to ensure that these items were kept safe; (iii) there was a non-production of the register book to record the exhibits, which was adverse to the defence case; and (iv) there was a significant difference of 82.08g in the weight of the jewellery recovered and that produced in court, which made the trial judge doubt the credibility of the defence case. The Sessions Court found liability against the first defendant as the investigating officer of the case and the fourth defendant as the Government of Malaysia to be vicariously liable for the acts of the first defendant. Hence, the defendants appealed against the said decision. The issues that arose were (i) whether the plaintiffs had pleaded a cause of action against the defendants; (ii) whether the defendants owed a duty of care to the

plaintiffs and if so, whether there had been a breach of that duty; and (iii) whether the court could decide on the quantum of damages in the absence of evidence from the plaintiffs.

Held (dismissing appeal):

(1) Although the cause of action was not expressly pleaded in the statement of claim, the plaintiff was not precluded from doing so in the reply. The Rules of Court 2012 ('ROC') provides that every pleading shall contain the necessary particulars of any claim; which pleading would include a reply (O. 18 r. 12(1)). Further, the plaintiffs' reply complied with O. 18 r. 8(1)(a) of the ROC 2012 as it was to rebut the defence allegation of no cause of action. The primary purpose of pleadings is to give notice to the parties as to the case they are to meet. The defendants were not left in any doubt as to the cause of action against them. The defence of the defendants was pleaded to meet a case founded on negligence. The evidence led at the trial to establish the safe and careful handling of the plaintiffs' jewellery, was to similarly defend a case in negligence. Contrary to the defendants' contention, it was not necessary to plead the elements constituting negligence, as that would be pleading law. The plaintiffs were merely required to plead facts constituting negligence, which they had when they pleaded the defendants' failure to ensure safe custody of the plaintiffs' jewellery. (paras 42-44)

(2) The existence of the duty of care could not be in any doubt as any item found to be used in the commission of an offence is required to be in the safe custody of the police for investigation and subsequent prosecution (s. 413(5) of the Criminal Procedure Code). The trial judge had carefully examined the evidence before him and concluded that the exhibits tendered in court on 19 June 2012 were not that identified by the plaintiffs on 5 February 2001 and 6 February 2001. He was right to consider the failure to produce the register book to record the jewellery recovered as material in view of irreconcilable discrepancies in the number of exhibits. The discrepancy in the weight of the exhibits were also indicative of negligence. The handling of the exhibits were found to be wanting in some aspects. The SCJ was justified in his finding that the defendants had breached their duty of care. As the defendants had sole and exclusive custody of the plaintiff's jewellery, and which were not the exhibits produced in court on 19 June 2012, it was more probable than not that the defendants had failed to ensure safe custody of the plaintiffs' property. (paras 47-48, 50, 54, 56 & 59)

(3) The plaintiffs had been deprived of their jewellery since 2001. As jewellers, the jewellery was their stock in trade. It is common knowledge that the price of gold had appreciated over the years. In 2012, the loss of the plaintiffs became certain when their jewellery was

not returned to them. It was reasonable to quantify the loss based on the price of gold then. Information obtained on the internet provided some basis upon which the damages could be quantified. Also, in the absence of evidence by the defendants to contradict the plaintiff's evidence on the price of gold in 2012, the Sessions Court Judge's award of damages in the sum of RM249,893.58 was upheld. (paras 62 & 64)

Case(s) referred to:
Caparo Industries plc v. Dickman & Ors [1990] 1 All ER 568 ***(refd)***
Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal [1997] 3 CLJ 189 CA ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Lok Kok Beng & Ors v. Loh Chiak Eong & Anor [2015] 7 CLJ 1008 FC ***(refd)***
Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***
Master Jaya Environmental Sdn Bhd v. Pentas Flora Sdn Bhd [2020] 2 CLJ 609 CA ***(refd)***
S Quarry Sdn Bhd v. Desaru Development Corporation Sdn Bhd & Ors [2019] 1 LNS 93 CA ***(refd)***
Tan Wei Hong & Ors v. Malaysia Airlines System Bhd & Ors [2018] 2 CLJ 84 CA ***(refd)***
Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd [2010] 4 CLJ 203 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 413(5)
Penal Code, ss. 395, 397
Rules of Court 2012, O. 18 rr. 8(1)(a), 12(1)

For the appellants/defendants - Syahriah Shapiee; FC
For the respondents/plaintiffs - Mohd Din Gilaldin Khan; M/s Din & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Alice Loke Yee Ching JC:

Introduction

[1] The appellants are the first and fourth defendants in the proceedings in the Sessions Court. They have appealed the decision of the Sessions Court on 14 November 2019 which, after a full trial found the appellants liable to pay the respondents a sum of RM249,893.58. The appeal is in respect of both liability and quantum.

Background Facts

[2] For ease of reference, the parties hereinafter referred to will be the same parties in the Sessions Court proceedings.

[3] The plaintiffs were siblings and partners of a jewellery shop, trading under the name of Kedai Emas Cheong Leong in Banting. On 1 February 2001, at about 4.30pm, five men robbed the jewellery shop of the plaintiffs. The jewellery loss from the offence committed was valued at about RM50,000.

[4] The robbers were successfully apprehended when the police launched OPS Tutup at all road exits from Banting. Jewellery items were recovered from them. The suspects were charged in the Klang Sessions Court on 4 February 2001 under ss. 395 and 397 of the Penal Code.

[5] On 5 February 2001, the first plaintiff together with a representative of their insurers went to the Banting police station to identify the recovered jewellery items. The first plaintiff confirmed that the jewellery which comprised of bangles as well as bracelets of various sizes, were taken from the plaintiffs' shop. The jewellery items were identified from the design and colour. A list of items recovered were prepared by the investigating officer, totalling 58 items in all. All the items had tags on them, save for three.

[6] The total weight in gold of the recovered items was 1,436.17g. The following day, the recovered items were also identified by three staff personnel of the plaintiffs from their handwriting on the tags.

[7] The criminal proceedings in respect of all the accused persons were rather protracted. Two of the accused pleaded guilty on 2 March 2001 and were sentenced on 6 April 2001. The remaining three claimed trial to the charges. The criminal proceedings were eventually concluded when the fifth accused person was granted a discharge not amounting to an acquittal in 2013.

[8] Prior to 2013, the plaintiffs made enquiries about the return of the jewellery. In response to the plaintiffs' query, they were informed by the police that as the jewellery were exhibits in the prosecution's case, it could only be returned when the criminal proceedings against all the accused persons have concluded.

[9] In April 2012, the plaintiffs filed an application under s. 413 of the Criminal Procedure Code for the return of the items taken from their shop. The application was heard on 19 June 2012.

[10] On the day of the hearing, the exhibits were produced in the Sepang Sessions Court in the presence of the presiding Sessions Court Judge, the investigating officer, the Deputy Public Prosecutor and all the plaintiffs. However, upon being asked to identify the items, the plaintiffs denied that the exhibits belonged to them as the jewellery were not of the type sold in their shop.

[11] The plaintiffs claimed that the exhibits produced in court were not pure gold but merely gold-plated jewellery. Their jewellery business dealt only in pure gold. Further, there was a difference in the weight in gold of about 82.08g. The weight of the exhibits produced in court was 1,518.25g when it ought to have been 1,436.17g instead.

[12] Thereupon, the plaintiffs refused to take possession of the exhibits. Following the dispute on the exhibits, the plaintiffs made a police report at the Salak Tinggi police station on 19 June 2012. On the advice of the presiding Sessions Court Judge, the investigating officer also lodged a report on the same day at the Kuala Langat police station.

[13] The exhibits were then sent to the Chemist Department for analysis. The findings of the chemist confirmed the allegation of the plaintiffs that the exhibits were gold plated jewellery. Upon analysing the exhibits, the chemist found that the exhibits were in fact made of copper and plated with gold.

[14] The plaintiffs filed the instant suit on 31 May 2018 in the Sessions Court. The plaintiffs' cause of action was premised on the defendants' negligence in the handling of the plaintiffs' jewellery items. The relief sought for was an order that the defendants deliver the items as identified by the plaintiffs on 5 February 2001. Alternatively, the defendants do compensate the plaintiffs the sum of RM330,000 for the loss of the jewellery or at the current price of gold.

[15] The plaintiffs named the Inspector M Yusof bin Jahaya as the first defendant. He was then the investigating officer of the case and had custody of the jewellery items. The second and third defendants being the superior officers of the first defendant, were also cited. Subsequent to the filing of the suit against the first to third defendants, the plaintiffs applied to amend their writ and statement of claim to include the Government of Malaysia as the fourth defendant. The fourth defendant was sought to be made vicariously liable for the acts of the first defendant pursuant to the provisions of the Government Proceedings Act 1956.

The Case Of The Respective Parties

[16] At the trial, the evidence for the plaintiffs' case was adduced through the testimony of the first and third plaintiffs. Much of their testimony was not challenged by the defence, except for the plaintiffs' claim that the exhibits produced in court on 19 June 2012 did not belong to their business, and were different from the items positively identified as theirs on 5 February 2001.

[17] They testified on two material facts in support of their case. The first was that the items stolen from their shop and recovered from the police were pure gold jewellery. Both PW1 and PW2 testified that their jewellery business established by their father in the 50's, dealt only in pure gold. Their suppliers for the stock in their shop supplied only jewellery made of pure gold and not items made of alloy.

[18] The first plaintiff stated that when he was called to the Banting police station on 5 February 2001, he confirmed the jewellery recovered to be those from his shop. He also said that the items recovered had tags on them. The next day, three of his staff was called to identify the items. Upon such identification, one of them prepared a document titled Items (Jewelleries) Recovered And Counted At Balai Polis Banting on 6 February 2001. This document was tendered as P2.

[19] The second material fact sought to be established by the plaintiffs was that the exhibits produced in court on 19 June 2012 were not those stolen from their shop and recovered from the accused persons.

[20] As for the defence case, eight witnesses testified, six of whom gave evidence to defend the claim of negligent handling of the exhibits. The evidence of these witnesses focused on the handling of the exhibits from the time they were recovered from the accused persons after their arrest on 4 February 2001, until the production of the exhibits in court on 19 June 2012, pursuant to the plaintiffs' application under s. 413 of the Criminal Procedure Code.

[21] The first defendant (DW1) was the first investigating officer of the robbery case. He testified that at all material times until his transfer to the Petaling Jaya District Police Headquarters in 2003, the exhibits were put into an envelope and kept in a steel cabinet in his office at the Kuala Langat police station. A register book was maintained to record the lists of exhibits. He was however unable to produce the register book in which he made entries of the list of exhibits as he had since retired. The exhibits were taken out from the cabinet on 2 March 2001, 6 April 2001, 5 June 2001, 5 September 2001, 25 January 2002, 2 July 2002, 10 December 2002 and 4 February 2003, to be brought to court for the purposes of criminal proceedings against the accused persons. They were however not taken out from the envelope, except on 6 April 2001 for the purposes of identification prior to sentencing of the accused.

[22] Sometime at the end of February 2003, prior to his transfer out from Kuala Langat police station, he handed over the exhibits to DW6, the storekeeper in the police station. DW6 then handed over the exhibits to DW4, the store supervisor for registration and safekeeping in the steel cabinet in the room of the Officer in Charge of the Police District ("OCPD"). The OCPD was the only person with the key to steel cabinet.

[23] DW6 was subsequently transferred to another division in 2006. DW5 took over DW6's functions as the storekeeper. DW5 testified that even though the exhibits were brought to court twice in 2008, the exhibits were not removed from the envelope. In 2010, DW6 was transferred back as the storekeeper, taking over from DW5.

[24] After DW1's transfer, DW3 who was then Ketua Bahagian Siasatan Jenayah Daerah ("KBSJD") of the Kuala Langat police station, instructed DW2 to take over the investigation into the robbery case in 2011 when one of the accused was re-arrested. By this time, DW3 had sole custody of the exhibits as it was the practice for valuable exhibits to be kept in a strong room in the KBSJD's room. On 26 March 2012, DW2 took the exhibits from DW3 for the purpose of taking them to court for the criminal proceedings of this accused. The trial however, did not proceed and he then returned the exhibits to DW3 without removing them from the envelope.

[25] On 23 April 2012, DW3 directed for the exhibits to be taken out from the strong room to be photographed, as instructed by the Deputy Public Prosecutor in charge of the criminal proceedings. The photography session was witnessed by DW3, DW2 and also DW6. DW2 said he saw the exhibits for the first time that day. After the photography session, DW3 had the exhibits placed in three plastic bags marked A, B and C and sealed.

[26] On 14 June 2012, DW3 handed the exhibits to DW2 to be brought to court on 19 June 2012 for the s. 413 proceedings. DW3 explained that he did so as he was unable to be present in court on 19 June 2012. DW2 said between 14 June 2012 and 19 June 2012, the exhibits were in a locked drawer in his room.

Decision Of The Sessions Court

[27] The evidence in support of the respective parties were duly considered by the trial judge who found for the plaintiffs. He held that the plaintiffs' case of negligence had been made out. He made several important findings of fact.

[28] He accepted the evidence of the plaintiffs' witnesses who testified that their gold jewellery business had been established as far back as the 50's. The business was started by their father and they dealt only in pure gold. A yearly premium of RM16,000 was paid for the insurance taken out on their business for a maximum indemnity of up to RM1 million. After the arrest of the accused, the plaintiffs positively identified the jewellery recovered as theirs on three occasions, namely 5 February 2001, 6 February 2001 in the Banting police station and 2 March 2001 in Shah Alam Court.

[29] The Sessions Court Judge found that based on the evidence adduced and taking into consideration the demeanour of the plaintiffs' witnesses in court, the plaintiffs had established that the jewellery first recovered from the accused persons were theirs, but the exhibits brought to court on their s. 413 application were not.

[30] As the jewellery recovered was legally in the custody of the first defendant and the other defence witnesses until the conclusion of the criminal proceedings, the defendants owed a duty of care to the plaintiff to ensure that these items were kept safe as it was to be returned to them when the criminal

proceedings concluded. Instead on 19 June 2012, the defendants produced in court gold plated jewellery made of copper. As such, the Sessions Court Judge was of the view that the defendants had breached the duty of care owed to the plaintiffs.

[31] The Sessions Court Judge also considered the non-production of the register book maintained by DW1 to record the exhibits, as material. He found the non-production of the book was adverse to the defence case. Further, there was a significant difference of 82.08g in the weight of the jewellery recovered and that produced in court on 19 June 2012. This fact caused the trial judge to doubt the credibility of the defence case.

[32] However, the Sessions Court Judge found liability against the first and fourth defendants only and held the fourth defendant to be vicariously liable for the acts of the first defendant.

The Grounds Of Appeal And The Issues For Determination

[33] The defendants have now appealed, and premised their appeal on 13 grounds as stated in their memorandum of appeal, and additional memorandum of appeal. The defendants submit that their grounds of appeal can be crystallised into four main issues for the court's determination as follows:

(i) whether the plaintiffs have pleaded a cause of action against the defendants;

(ii) whether the defendants owe a duty of care to the plaintiffs and if so whether there has been a breach of that duty;

(iii) whether the plaintiffs can be said to have proven its case by the mere failure of the defendants to prove its defence; and

(iv) whether the court can decide on the quantum of damages in the absence of evidence from the plaintiff.

[34] I am mindful that this is an appeal after a full trial and that an appellate court will generally be hesitant to disturb the findings of the trial judge unless there are clear appealable errors.

[35] An appellate court will not, generally speaking, intervene and interfere unless the trial court is shown to be plainly wrong in arriving at its conclusion. Matters of finding of facts and legitimate exercise of discretion by the courts of original jurisdiction are often not interfered with by the appellate courts. (See *Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd* [2010] 4 CLJ 203; [2010] 3 MLJ 425; and *Master Jaya Environmental Sdn Bhd v. Pentas Flora Sdn Bhd* [2020] 2 CLJ 609; [2020] 2 MLJ 117).

[36] However, appellate interference is warranted where the trial judge has made a decision which is plainly wrong. A decision is plainly wrong if it is one which no reasonable judge could have reached.

[37] The Court of Appeal in *S Quarry Sdn Bhd v. Desaru Development Corporation Sdn Bhd & Ors* [2019] 1 LNS 93; [2019] MLJU 99 laid down several instances when decisions are considered to be plainly wrong or perverse. Some of the instances where the trial judge's decision is perverse, are where he had:

(i) misdirected itself on the evidence;

(ii) failed to judicially appreciate the evidence;

(iii) failed to consider any material evidence;

(iv) acted on some irrelevant evidence as to render the decision wholly erroneous;

(v) made wrong inference from facts;

(vi) misapprehended the facts; or

(vii) gave reasons which are wholly unsatisfactory or contradictory of each other.

(See also *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97).

Decision Of This Court

[38] I shall now deal with the specific issues that defendants contend are critical to resolving this appeal in their favour.

Whether The Plaintiffs Have Pleaded A Cause Of Action Against The Defendants

[39] The defendants contend that the trial judge erred in finding negligence established when the plaintiffs' statement of claim did not plead a cause of action against the defendants. Further, if a cause of action in negligence was pleaded, they further contend that the elements constituting negligence in law must be pleaded.

[40] The contention of the defendants can be answered by reference to the plaintiffs' reply dated 21 September 2018. A cause of action in negligence was clearly pleaded in para. 4, in response to the defendant's allegation in para. 9 of the defence that the statement of claim of the plaintiffs failed to disclose a cause of action. The averment in the reply states:

> 4. Merujuk perenggan 9 Pembelaan, Plaintif-Plaintif menyatakan bahawa Pegawai Penyiasat atau lain-lain pegawai yang bertanggungjawab menjaga barang bukti kes telah cuai dalam menjalankan tugas untuk memastikan barangan kemas milik Plaintif-Plaintif disimpan dengan selamat dan mengembalikan barang asal kepada pemiliknya tanpa sebarang gangguan apabila selesai kes.

[41] In the light of para. 4 of the reply to the defence, the defendants' contention that no cause of action in negligence was pleaded is wholly without merit.

[42] Although the cause of action was not expressly pleaded in the statement of claim, the plaintiff is not precluded from doing so in the reply. The Rules of Court 2012 provide, that every pleading shall contain the necessary particulars of any claim; which pleading would include a reply. (See: O. 18 r. 12(1)). Further, the plaintiffs' reply complied with O. 18 r. 8(1)(a) of the Rules of Court 2012 as it was to rebut the defence allegation of no cause of action.

[43] The primary purpose of pleadings is to give notice to the parties as to the case they are to meet. The defendants here were not left in any doubt as to the cause of action against them. The defence of the defendants was pleaded to meet a case founded on negligence. The evidence led at the trial to establish the safe and careful handling of the plaintiffs' jewellery, was to similarly defend a case in negligence.

[44] Contrary to the defendants' contention, it is not necessary to plead the elements constituting negligence, as that would be pleading law. The plaintiffs were merely required to plead facts constituting negligence, which they had when they pleaded the defendants' failure to ensure safe custody of the plaintiffs' jewellery.

Whether The Defendants Owe A Duty Of Care To The Plaintiffs And If So Whether There Has Been A Breach Of That Duty

[45] The existence of a duty of care is an essential ingredient of the tort of negligence. The law on the elements of negligence is trite, and was reiterated in *Tan Wei Hong & Ors v. Malaysia Airlines System Bhd & Ors* [2018] 2 CLJ 84; [2017] 4 MLJ 540 as follows:

> [21] Perhaps, in order to better appreciate the issues raised by the parties, it is helpful to note briefly on the law of negligence. There are five distinct elements of negligence:
>
> (a) that the defendant had a obligation to the plaintiff to take care (ie he owed a duty of care to the plaintiff);
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> (b) that the defendant should have observed a particular standard of care in order to fulfil or perform that duty;
>
> (c) that the defendant breached his duty of care by failing to fulfil or observe the relevant standard of care;
>
> (d) that the breach of duty caused harm to the plaintiff; and
>
> (e) that such harm was not too remote or unforeseeable such that the defendant is to liable for its occurrence (see Fridman, Gerald Henry Louis, *The Law of Torts in Canada*, Vol I, Toronto, Carswell 1989, at p 317).

[46] The imposition of the duty of care on the part of the tortfeasors is however still developing, and is largely dependent on the question of proximity of the relationship of the parties and the foreseeability of harm (see *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 7 CLJ 1008; [2015] 4 MLJ 734; *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389; and *Caparo Industries plc v. Dickman and Ors* [1990] 1 All ER 568).

[47] In the instant case, the existence of the duty of care cannot be in any doubt as any item found to be used in the commission of an offence is required to be in the safe custody of the police for investigation and subsequent prosecution. This duty is statutorily provided for in sub-s. 413(5) of the Criminal Procedure Code as follows:

Procedure by police on seizure of property

413(1) The seizure or finding by any police officer of property taken under section 20 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be immediately reported to a Magistrate, who shall make such order as he thinks fit respecting the delivery of the property to the person entitled to the possession of it, or, if that person cannot be ascertained, respecting the custody and production of the property.

(2) If the person so entitled is known the Magistrate may order the property to be delivered to him on such conditions, if any, as the Magistrate thinks fit, and shall in that case cause a notice to be served on that person informing him of the terms of the order and requiring him to take delivery of the property within such period from the date of the service of the notice (not being less than forty-eight hours) as the Magistrate may in the notice prescribe.

(3) If that person is unknown the Magistrate may direct that the property be detained in police custody, and the Chief Police Officer shall, in that case, issue a public notification specifying the articles of which the property consists and requiring any person who has any claim to it to appear before him and establish his claim within six months from the date of the public notification:

Provided that, where it is shown to the satisfaction of the Magistrate that the property is of no appreciable value, or that its value is so small as, in the opinion of the Magistrate, to render impracticable the sale, as hereinafter provided, of the property, or as to make its detention in police custody unreasonable in view of the expense or inconvenience that would thereby be involved, the Magistrate may order the property to be destroyed or otherwise disposed of, either on the expiration of such period after the publication of notification above referred to as he may determine or immediately as he thinks fit.

(4) Every notification under subsection (3) shall, if the value of the property amounts to fifty ringgit, be published in the *Gazette*.

(5) *Notwithstanding the preceding subsections, where the property is required for the investigation of a case and it is necessary for the property to be detained, the property shall be kept in a safe and proper place by the Officer in charge of a Police District where the offence was committed.* (emphasis added)

[48] The principal issue then for this court's determination is not whether a duty of care exists, but whether that duty was breached. On this issue, the trial judge had carefully examined the evidence before him and concluded that the exhibits tendered in court on 19 June 2012 were not that identified by the plaintiffs on 5 February 2001 and 6 February 2001.

[49] He arrived at this conclusion after hearing the oral evidence of PW1 and PW2, and ruled that they were credible witnesses of fact. He accepted their evidence that the jewellery they identified were made of pure gold. He had the benefit of evaluating the credibility of their oral evidence from his observation of their demeanour. Having had the audio visual advantage, the trial judge was better placed to decide on the truthfulness of the witnesses. (See *Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal* [1997] 3 CLJ 189; [1997] 2 MLJ 465).

[50] He was right to consider the failure to produce the register book to record the jewellery recovered as material. Although DW1 could not produce the register book as he had retired, it was not produced through any of the other defence witnesses. The failure to produce is material in view of an irreconcilable discrepancy in the number of exhibits.

[51] The list of jewellery items prepared by DW1 on 6 February 2001 had a list of 58 items. The list was a document marked as D15 and titled Items (Jewelleries) Recovered And Counted At Balai Polis Banting on 6 February 2001; signed by both plaintiffs' witness and DW1 himself. The list mentioned the items recovered comprised of ten small bangles, 24 small bracelets and 21 big bracelets. DW1 also made a note that three bracelets were without tags and the stock code.

[52] However, the total number of exhibits produced in court on 19 June 2012 was only 57. In the police report lodged by DW2 after the exhibits were disputed by the plaintiffs, DW2 mentioned 57 items. DW8 certified that DW2 handed over to him 57 items for investigation, as stated in the perakuan serah/terima barang kes dated 22 June 2012. The chemist also confirmed that 57 items were received by her for analysis. When the items were removed from the steel cabinet of DW3 to be photographed on 24 March 2012, there were only 57 pieces of jewellery which he put in three bags labelled A (23 pieces), B (24 pieces) and C (10 pieces). The discrepancy was never explained.

[53] The earliest record of the exhibits was D10, which was produced as buku daftar barang-barang kes berharga. However, the record of entries for D10, started from 15 July 2006. There was no record of entries prior to that. DW6, the storekeeper of the exhibits said that the original register book went

missing. The fact that the register book was not available was also confirmed by DW4 and DW5. DW5 said he was directed to re-register the exhibits by the OCPD on 15 July 2006. When asked as to how the register book could have gone missing, his answer was "Buku itu hilang sewaktu Koperal Idrus lari dari tugas". Koperal Idrus was DW4. Although DW5 was asked to register the exhibits, he candidly admitted that he did not examine the exhibits at all to confirm its existence and description.

[54] The learned Sessions Court Judge found the discrepancy in the weight of the exhibits to be indicative of negligence. I am inclined to agree with him. The weight of gold items in Items (Jewelleries) Recovered And Counted At Balai Polis Banting on 6 February 2001 (P2) was stated as 1,436.17g. P2 was in part A of the agreed bundle of documents. It was also the pleaded case of the defendants that the weight of the jewellery identified by the plaintiffs on 5 February 2001 was 1,436.17g (see para. 6(e) of the defence). However the weight of the exhibits sent to DW7, the chemist, was 1,518.25g. This fortifies the finding that the exhibits on 19 June 2012 were not the plaintiffs' jewellery.

[55] The evidence of DW7, the chemist conclusively established that the exhibits were not pure gold but gold-plated items. As the plaintiffs' evidence that they dealt only in pure gold was accepted by the Sessions Court Judge, he was therefore entitled to conclude that on a balance of probabilities, the defendants had breached their duty of care in failing to ensure the safe keeping of the jewellery items.

[56] I find the handling of the exhibits to be wanting in some aspects. DW1 said he kept the exhibits in his room in a steel cabinet although there was a store for the keeping of exhibits. He admitted that it was not the usual practice to do so, but he did it for his convenience. He only handed it over to the exhibit store for safekeeping when he received news of his transfer out from the Kuala Langat police station.

[57] The exhibits were taken to court on several occasions. Whilst in the custody of DW1, it was taken to court for as many as eight times from the 2001 to 2003. After he was transferred, the exhibits were handled by several people in the intervening years. DW5, the store supervisor, said he brought the exhibits to court on two occasions in 2008, where they were taken out from a steel cabinet in the OCPD's room. The key to the cabinet was requested from the secretary to the OCPD. Upon his return from the court the key to the safe was again requested from the OCPD's secretary, and the exhibits placed back in the cabinet. This evidence suggests that the OCPD did not have exclusive custody of the exhibits. On the two occasions the exhibits were taken to court by DW5, he observed that the envelope containing the exhibits was merely stapled at the edge.

[58] DW3's evidence on the condition of the exhibits when he first saw them on 23 April 2012 is also troubling. When the exhibits were taken out to be photographed, the exhibits were placed in an envelope which was not properly sealed, as the seal was torn in some places. DW3 postulated that this could have happened through frequent handling to and from court. It was only after the photography session that he placed the exhibits in three plastic bags marked A, B and C.

[59] Upon considering the totality of the evidence, I find that the Sessions Court Judge was justified in his finding that the defendants had breached their duty of care. As the defendants had sole and exclusive custody of the plaintiffs' jewellery, and which were not the exhibits produced in court on 19 June 2012, it was more probable than not that the defendants had failed to ensure safe custody of the plaintiffs' property.

Whether The Plaintiffs Can Be Said To Have Proven Its Case By The Mere Failure Of The Defendants To Prove Its Defence

[60] This issue is wholly misconceived and doesn't arise. The decision of the Sessions Court Judge was premised on specific findings of fact when he concluded that the plaintiffs had succeeded in proving their case. His evaluation of the evidence and his conclusion does not suggest that the case of the plaintiffs was proven from the failure of the defendants to prove their defence.

Whether The Court Can Decide On The Quantum Of Damages In The Absence Of Evidence From The Plaintiffs

[61] The plaintiffs sought to be compensated from the loss occasioned from the defendants' breach. Although the amount of RM330,000 was pleaded in the statement of claim, the loss is to be assessed and quantified as general damages sought.

[62] The plaintiffs have been deprived of their jewellery since 2001. As jewellers, the jewellery is their stock in trade. During the trial in the Sessions Court, they sought to be compensated at current price of gold.

[63] To assess the amount of damages based on the current price of gold, the Sessions Court Judge referred to information obtained from the website of www.PelaburanEmasPublicGoldMalaysia.com. The price of gold as at 1 March 2012 was stated as RM1,744 per 10g. He then computed the compensation amount by multiplying this figure with the weight of the gold jewellery recovered, and arrived at a sum of RM249,893.58.

[64] Whilst I would not regard this as the best evidence as to the current price of gold, I would not disregard it. It is common knowledge that the price of gold has appreciated over the years. In 2012, the loss of the plaintiffs became certain when their jewellery could not be returned to them. It is reasonable to quantify the loss based on the price of gold then. The

information obtained on the internet provided some basis upon which the damages can be quantified. Also, in the absence of evidence by the defendants to contradict the plaintiffs' evidence on the price of gold in 2012, I will uphold the Sessions Court Judge's award of damages.

Conclusion

[65] Based on the foregoing, I find no appealable error on the part of the Sessions Court Judge in allowing the plaintiffs' claim and awarding damages of RM249,893.58. The appeal is therefore dismissed with costs of RM3,000.